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No. 92-267

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UJB FINANCIAL CORP., et al.,
Petitioners,

v.

IRWIN SHAPIRO, ROBERT BASSMAN, JEROME KATZ, NORMAN SALSITZ, JEAN LEE, and CHAPPAQUA FAMILY TRUST,
Respondents.

BRIEF OF RESPONDENT IRWIN SHAPIRO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Should Petitioners' writ of certiorari be granted in a securities fraud suit to consider the highly fact-specific issue of whether a complaint complies with Rule 9(b), Fed.R.Civ.P., where (a) in an interlocutory ruling, the Court of Appeals agreed with Petitioners and the District Court that Respondents' complaint failed to allege fraud with the particularity required by Rule 9(b) and remanded the case to the District Court directing Respondents to amend their complaint, and (b) the Court of Appeals decision followed the legal standards utilized by courts in every Circuit in the United States.

2. Was the Court of Appeals correct in holding, in conformance with a long line of this Court's decisions, that statements of material facts made by corporate officers and directors must be truthful?

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STATEMENT OF THE CASE

This case, a securities class action suit, alleges violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 ("Exchange Act") by defendants. The District Court dismissed the complaint and the Court of Appeals agreed that the complaint did not satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure and remanded the case, *inter alia*, so that the plaintiffs could amend and attempt to satisfy Rule 9(b). Defendants below, successful in their argument that the complaint failed to comply with Rule

9(b), have filed this Petition For A Writ Of Certiorari challenging the Rule 9(b) ruling of the Court of Appeals.

Irwin Shapiro and the other plantiffs below, Respondents herein, filed a Consolidated Amended Class Action and Derivative Complaint ("Complaint") on their own behalf and on behalf of a plaintiff class consisting of all persons who purchased the publicly traded securities of UJB Financial Corp. ("UJB" or the "Company") during the period beginning approximately February 1, 1988 through and including July 18, 1990 (the "Class Period"). The defendants in this action are UJB, a multi-billion dollar interstate bank holding company, as well as certain of UJB's senior-most officers and directors, including members of the "Audit Committee" of UJB's Board of Directors. Plaintiffs charge that defendants issued a series of materially false and misleading statements to the investing public during the Class Period in violation of Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission.

The gravamen of the Complaint is that throughout the Class Period, defendants issued public releases and statements that misrepresented UJB's true financial condition by, *inter alia*, overstating UJB's reported income and assets by consciously understating its reserves for loan losses. The Complaint further charges that defendants falsely represented UJB to the public as a growing, well-managed, and profitable institution, with highly conservative lending practices, a diverse loan portfolio, and adequate reserves to cover potential loan problems. Further, defendants falsely represented that UJB's internal loan review procedures and policies were stringent and provided continuous monitoring of the quality of the loan portfolio and potential loan problems. (A-3-A-10). This false portrait of UJB deceived the investing public (including plaintiffs and members of the Class) into making purchases of UJB securities during the Class Period at artificially inflated prices, thereby sustaining substantial losses. The Complaint

describes in exacting detail when and where defendants lied about the condition of UJB, in which public pronouncements these false statements appeared, who made or was responsible for those statements, and how those statements were false and misleading.

UJB stunned the investment community when, for the first time, in press releases dated April 18 and July 18, 1990, it acknowledged some problems with its loan portfolio. In these press releases, the Company announced that it would be increasing its loan loss reserves by $20 million and $40 million, respectively, for the first and second quarters of 1990. On October 17, 1990, UJB shocked the investment community further by reporting a loss of nearly $20 million for the quarter ending September 30, 1990, compared with reported net income of over $31 million for the quarter ending September 30, 1989. UJB further announced in its October 17 press release that it had added $124 million to its loan loss reserves, $113 million more than it had set aside in the third quarter of 1989. UJB disclosed in this press release that the enormous addition to loan loss reserves was necessitated by a $171 million increase during the quarter in non-performing loans (i.e. those loans seriously delinquent or being repaid under eased terms). As a result of the disclosures of the truth, the common stock of UJB, which traded in excess of $25 per share during the Class Period, fell to an all-time low of $6.50 per share.

The district court found that many of plaintiffs' allegations did not satisfy the requirements of Rule 9(b), Fed.R.Civ.P., which requires that allegations of fraud be pleaded with particularity. (A-49-A-50). The district court dismissed the remaining allegations of the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, ruling that such allegations constituted "nothing more than assertions of mismanagement" rather than misstatements and omissions of material facts, and therefore not actionable under the federal securities laws. (A-41).

The Court of Appeals agreed with the district court that the complaint did not satisfy the specificity requirements of Rule 9(b), and granted plaintiffs leave to amend their complaint to attempt to comply with Rule 9(b), leaving "it to the district court to evaluate in the first instance the particularity of these allegations" (A-24-A-25).

With respect to those charging allegations of the complaint dismissed by the district court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court of Appeals held that many of these allegations appeared to involve allegations of untrue statements of material fact under this Court's decisions in *TSC Industries, Inc. v. Northway, Inc.*, 424 U.S. 438 (1976), and *Virginia Bankshares, Inc. v. Sandberg*, ___U.S. ___, 111 S.Ct. 2749 (1991), which require that statements of material facts by corporate officers and directors must be truthful. (A-15-A-22). However, the Court of Appeals ruled that "plaintiffs' style of pleading has made it difficult to parse the complaint, primarily because many of the actionable allegations were intermingled with the inactionable." (A-21). The Court of Appeals therefore remanded the case to the district court, reasoning (A-22):

> . . . in light of the confusion that pervades plaintiffs' allegations, we conclude that the entire complaint must be reorganized. Therefore, on remand plaintiffs should rearrange the existing allegations into discrete units that are, standing alone, each capable of evaluation under the legal principles we have set forth.

After the Court of Appeals' decision was issued, Petitioners filed in the Court of Appeals a request for rehearing or rehearing *en banc*. The purported basis for the request was that the Court of Appeals decision conflicted with the Third Circuit's not-for-publication, one paragraph Judgment Order in *Decker v. Landmark Savings Ass'n*, No. 91-3776 (3d Cir. May 20, 1992), and

its decision in *Christidis v. First Pennsylvania Mortgage Trust*, 717 F.2d 96 (3d Cir. 1983). Recognizing that there was no conflict, the original panel denied Petitioners' request for rehearing and the full Court of Appeals for the Third Circuit, denied Petitioners' request for rehearing *en banc* by Order dated July 2, 1992. (A-51).

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

There is no need to grant certiorari to decide any of the issues raised by Petitioners. As demonstrated below, the "Questions Presented For Review" by Petitioners simply do not relate to the decision of the Court of Appeals. Contrary to the issues set forth in the Petition, the Court of Appeals did not "eviscerate" Rule 9(b)'s pleading requirement; nor did the Court of Appeals "announce[] a new, 'relaxed' application of Rule 9(b), Fed.R.Civ.P." which "contradicts" either the standards applicable in any other Circuit or within the Third Circuit. In fact, the Court of Appeals agreed with the district court and Petitioners that the Complaint did not satisfy the requirements of Rule 9(b). Consistent with standards governing amendments of pleadings found to be deficient, the Court of Appeals remanded the case to the district court and granted leave to amend the Complaint to attempt to satisfy Rule 9(b). The Court of Appeals specifically left "it to the district court to evaluate in the first instance the particularity of these allegations." (A-25). *Thus, there is at present no viable complaint for this Court to review.* This case therefore is simply not ripe for consideration by this Court. *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 398 U.S. 327, 328 (1968). It would be premature for this Court to consider this case, as nothing more than an advisory opinion concerning the scope of Rule 9(b) can be offered by this Court on the present record.

Nor is there a conflict between the decision of the Court of Appeals here and the decisions of other Courts

of Appeals or other decisions of the Third Circuit concerning the requirements of Rule 9(b). The decision below follows the same standards that have been applied by courts throughout the United States for many years. The fact that there are numerous decisions both sustaining and dismissing complaints under Rule 9(b) underscores the fact that complaints differ, and the differing results in these cases demonstrate nothing more than different conclusions concerning different complaints reached by applying compatible standards. Indeed, a ruling under 9(b) – that a complaint does or does not plead the circumstances of an alleged fraud with sufficient particularity – is unquestionably one of the most fact-intensive, fact-specific and case-by-case rulings a district court can be called upon to make on any subject. The very essence of the court's inquiry is, indeed, factual. Nor could it be otherwise, since the court is called upon to gauge whether or not sufficient factual particularity is set out by the averments of the complaint.

Defendants also contend that review of this case is necessary because the Court of Appeals ruled that a fact becomes "material" within the meaning of the securities laws simply by virtue of its being discussed by management in its public reports. This is simply not true. Indeed, in addressing the issue of "materiality," the Court of Appeals "provided an extensive review of the Supreme Court's jurisprudence on materiality" (A-15-A-16). The Court of Appeals also reaffirmed that a fact is "material" within the meaning of the securities laws *only if,* after a "delicate assessment[] of the inferences a reasonable shareholder would draw from a given set of facts," "there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder" and "whether there is a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having 'significantly altered the "total mix" of information available to

that investor.' " (A-15-A-16) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The Court of Appeals also reaffirmed that "[o]nly if the alleged misrepresentations and omissions are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality is it appropriate for the district court to rule that the allegations are inactionable as a matter of law." (A-16) (citing *TSC Industries, Inc.*, 426 U.S. at 449)). The Court of Appeals followed all Supreme Court precedent in reaching this result.

I. PETITIONERS ARE SEEKING A HYPOTHETICAL, INTERLOCUTORY ADVISORY OPINION, AS THE COURT OF APPEALS BELOW AGREED WITH THE DISTRICT COURT THAT THE COMPLAINT FAILS TO PASS MUSTER AND GRANTED PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT

Petitioners' request that this Court grant certiorari and consider this case erroneously presupposes that the Court of Appeals below has upheld the allegations of the complaint against defendants under Rule 9(b). But this is exactly the opposite of what occurred below. It cannot be overstated that the Court of Appeals *agreed* with the district court and Petitioners that plaintiffs' complaint did *not* satisfy the requirements of Rule 9(b). Thus Petitioners have failed the first test for consideration by this Court. They are not even aggrieved by the Order below. They contended that the Complaint did not satisfy Rule 9(b) and both the district court and Court of Appeals agreed. The Court of Appeals remanded the case to the district court and granted plaintiffs leave to amend their complaint to comply with the particularity requirements of Rule 9(b). (A-24-A-25).[1] The Court of

1. In so ruling, the Court of Appeals followed the proper procedure universally followed by courts under analogous circumstances. *See* 2A Moore & Lucas, *Moore's Federal Practice* ¶9.03 at 9-34 (2d ed. 1984). *See also Yoder v. Orthomolecular National*

Appeals left "it to the district court to evaluate in the first instance the particularity of these allegations." (A-25).

Thus, the question of whether Respondent has – or can – plead an adequate complaint is entirely speculative, hypothetical and premature, given the Court of Appeals' direction to amend the Complaint to excise inactionable allegations, to clarify claims, and to add more particularity in allegations. Under these circumstances, it would be a wasteful exercise for this Court to determine whether the first version of the Complaint – which has been directed to be amended by the Court of Appeals – is sufficiently specific to satisfy Rule 9(b). This Court has consistently refused to consider hypothetical questions and to issue advisory opinions at an interlocutory stage of a case, which would be the result here if certiorari were to be granted to consider the allegations of a complaint that is no longer operative and a case which has been remanded. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.,* 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus the case] is not yet ripe for review by the Court."). Whether Respondent's new complaint, which is not yet in existence, ultimately pleads fraud with sufficient particularity is obviously a question that cannot be answered at this time.

NOTES *(Continued)*

Institute Inc., 751 F.2d 555, 562 & n.6 (2d Cir. 1985); *Luce v. Edelstein,* 802 F.2d 49, 56-57 (2d Cir. 1979), *cert. denied,* 446 U.S. 946 (1980) ("because we are hesitant to preclude the prosecution of a possibly meritorious claim because of defects in the pleadings, we believe that the plaintiffs should be afforded an additional, albeit final opportunity to conform the pleadings to Rule 9(b).").

II. A RULE 9(b) DECISION IS EXTREMELY FACT-SPECIFIC AND IS NOT THE TYPE OF ISSUE THIS COURT CONSIDERS

In their attempt to have this Court believe that there is a conflict among the Circuits concerning the standards required to satisfy Rule 9(b), Petitioners present a number of Court of Appeals and district court decisions on the application of Rule 9(b) to individual complaints, in an effort to create the illusion of a "conflict" among the Circuits and "confusion" at the district court level. However, this variation in results does not represent any "conflict" or "confusion." These decisions – some sustaining complaints and others dismissing or affirming the dismissal of complaints – serve only to emphasize the fact that any determination of whether Rule 9(b)'s particularity requirement has been satisfied requires an individualized assessment of the unique allegations contained in the specific complaint under consideration. And individualized fact-specific issues which cannot be generally applicable are simply not the type that this Court hears and decides. Indeed, this Court has consistently denied certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the analysis of particular documents. *See, e.g., United States v. Johnston,* 268 U.S. 220, 227 (1925) ("[w]e do not grant certiorari to review evidence and discuss specific facts"); *NLRB v. Hendricks Rural Electric Corp.,* 454 U.S. 170, 176 n.8 (1981) (improvident grant of certiorari that presented primarily a question of fact "which does not merit Court review").

The decisions applying Rule 9(b) that Petitioners cite as evidence of "confusion" each turn almost entirely on the specific allegations of the particular complaint at hand, not on any claimed variation in the standards for applying Rule 9(b). This was recognized by the court in *Urbach v. Sayles,* 779 F.Supp. 351 (D.N.J. 1991) when it rejected the notion that the existence of decisions

sustaining and dismissing complaints under Rule 9(b) (including many of the decisions upon which Petitioners focus) represented a "conflict" concerning the appropriate standards to be applied under Rule 9(b). The court reasoned that "[a]lthough the authorities cited by defendant rejected plaintiffs' fraud claims for failure to satisfy Rule 9(b), the showing of particularity there required is no different from the standard enunciated by this Court and satisfied by the plaintiff". 779 F.Supp. at 364.

A decision by this Court concerning what might be appropriate allegations under Rule 9(b) in this complaint against UJB would do little to aid district courts in the future, since those courts will still have to carefully consider the specific factual allegations that are pled in the complaints before them. This Court has consistently denied petitions for writs of certiorari to review Court of Appeals decisions involving Rule 9(b). *See, e.g., DiLeo v. Ernst & Young,* 901 F.2d 624 (7th Cir.), *cert. denied,* 111 S.Ct. 347 (1990); *Luce v. Edelstein,* 802 F.2d 49 (2d Cir. 1979), *cert. denied,* 446 U.S. 946 (1980); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.,* 742 F.2d 786 (3d Cir. 1984), *cert. denied,* 469 U.S. 1211 (1985); *Ross v. A.H. Robins Co.,* 607 F.2d 545, 557 n.20 (2d Cir. 1979), *cert. denied,* 446 U.S. 846 (1980); *Deane v. Thomson McKinnon Securities, Inc.,* 586 F.Supp. 44, 48 (D.D.C. 1984), *aff'd,* 762 F.2d 137, *cert. denied,* 474 U.S. 903 (1985).

III. THERE IS NO CONFLICT – WHETHER INTER- OR INTRA-CIRCUIT – CONCERNING THE STANDARDS APPLICABLE UNDER RULE 9(b)

A. *There Is No Conflict Among The Circuits Concerning The Proper Application of Rule 9(b)*

Petitioners contend that this Court should grant *certiorari* "to address a conflict among the Circuits" concerning the proper pleading standards required by Rule 9(b). (Pet. at 8). Defendants even go so far as to contend that this supposed "inter-Circuit conflict . . . is

crystal clear." (Pet. at 9). In support of their claim of an inter-Circuit conflict, Petitioners contend that the decision of the Court of Appeals below is in an "irreconcilable" conflict with the decisions of the Second Circuit in *Denny v. Barber*, 576 F.2d 465 (2d Cir. 1978), the First Circuit in *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991), and the Seventh Circuit in *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir. 1990). Petitioners are wrong.

The fact that some courts have dismissed complaints under Rule 9(b) and others have upheld complaints is not the result of varying standards among the Circuits. Rather, as indicated above, it is simply a reflection of the obvious fact that any determination of whether Rule 9(b)'s particularity requirement has been satisfied requires an individualized assessment of the unique allegations contained in the specific complaint under consideration, and results will necessarily vary given the fact that individual complaints will vary. This point was made most clearly by Judge Friendly in *Denny v. Barber*, one of the three decisions Petitioners erroneously rely upon in support of their claim of "irreconcilable conflict":

> Plaintiff's counsel has called our attention to a number of district court decisions . . . which are alleged to have sustained complaints no more specific than this. Defendants dispute this and counter with an equal number of district court decisions alleged to have dismissed complaints more specific than this one. *We see no profit in attempting to analyze these decisions, which may or may not be consistent and each of which necessarily rests on its particular facts.*

576 F.2d at 470 (emphasis added).

The "conflict" among the Circuits, according to Petitioners, is that the decision of the Court of Appeals below "permits a plaintiff to prosecute a securities fraud

action, despite plaintiff's inability to plead any facts demonstrating how any defendant's behavior departed from proper conduct, or how any defendant's statement was inaccurate (much less fraudulent), solely on the ground that such plaintiff claims to have been unable to uncover any such facts prior to the filing of a complaint." (Pet. at 8). Petitioners' argument misstates the ruling of the Court of Appeals below.

It bears repeating that the Court of Appeals below *agreed* with the district court that the Complaint, as pleaded, did not satisfy the requirements of Rule 9(b), and directed plaintiffs to replead to attempt to satisfy Rule 9(b). Indeed, the Court of Appeals below emphasized that the threshold for satisfying Rule 9(b) is a "stringent" one (A-23), and emphasized that one of the purposes of the Rule is "to ensure that plaintiffs thoroughly investigated all possible sources of information, including but not limited to all publicly available relevant information, before filing a complaint" (A-24), and required a securities fraud plaintiff to delineate his efforts to discover information prior to filing his complaint. This is hardly an endorsement of a "sue first, find claims later" approach (Pet. at 24). It is therefore by no means surprising that commentators have described the decision of the Court of Appeals below as a victory for defendants charged with violations of the securities laws. *See* J.B. Kasner, R.W. Gordon, *Shareholder Suits: Ruling A Victory For Banks,* American Banker, August 5, 1992 ("Significantly, . . . the appeals court reaffirmed that plaintiffs must specifically provide a factual basis for their allegations of fraudulent conduct.").

What Petitioners seize upon in their effort to create the impression of a "conflict" is that the Court of Appeals below simply repeated the fundamental axiom that, when applying Rule 9(b), courts should be mindful of the fact that "application of the Rule prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud,' " and therefore:

> . . . where the facts are in the exclusive possession of the adversary, courts should permit the pleader to allege the facts on information and belief, provided a statement of the facts upon which the belief is founded is proffered.

(A-24) (quoting, 2 A. James W. Moore & Jo D. Lucas, *Moore's Federal Practice,* ¶9.03[1] at 9-29 to 9-29 (1991)). The Court of Appeals further stated that, as an added safeguard:

> To avoid dismissal in these circumstances, a complaint must delineate at least the nature and scope of plaintiffs' effort to obtain, before filing the complaint, the information needed to plead with particularity. This requirement is intended to ensure that plaintiffs thoroughly investigate all possible sources of information, including but not limited to all publicly available relevant information, before filing a complaint.

(A-24).

There is nothing new, or unique, about the Court of Appeals decision below in this regard, as evidenced by the Court's citation to an extensive, supportive quotation from *Moore's Federal Practice*. Moreover, it is a principle recognized by decisions within every Circuit, including the First, Second and Seventh Circuits with which Petitioners contend that the decision below "conflicts." *See:*

First Circuit – New England Data Servs., Inc. v. Becher, 829 F.2d 286, 288-89 (1st Cir. 1987)(pleading on information and belief permissible if information "is likely in the exclusive control of the defendants.").

Second Circuit – DiVittorio v. Equidyne Extractive Industries, Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)(allegations of fraud may be based on information and belief "as to facts peculiarly within the opposing party's knowledge, in which event the allegations must be accompanied by a statement of the facts upon which

the belief is based") and *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)("[d]espite the rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge.").

Fourth Circuit – Sweeney Co. of Maryland v. Engineers-Constructors, Inc., 109 F.R.D. 358, 360 (E.D. Va. 1986)("[i]f . . . plaintiffs do not have access to information, 'some relaxation of Rule 9(b) is necessary when plaintiffs are not likely to have more specific information until after discovery.' ").

Fifth Circuit – Cadle Co. v. Schultz, 779 F.Supp. 392, 396 (N.D. Tex. 1991) (under Rule 9(b), "a complaint alleging a cause of action for fraud must state with particularity the circumstances constituting the fraud. . . . [I]f the information surrounding the allegations is peculiarly within the knowledge of the defendant, less detail is required in the complaint.").

Sixth Circuit – Michaels Building Co. v. Ameri-Trust Co., N.A., 848 F.2d 674, 680 (6th Cir. 1988) ("[c]ourts have held that the rule may be relaxed where information is only within the opposing party's knowledge. . . . Rule 9(b) does not require omniscience").

Seventh Circuit – Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 680 (7th Cir. 1992)(Rule 9(b)'s requirements of pleading the circumstances constituting fraud with particularity can be fulfilled by pleading those circumstances on "information and belief" if "they were facts inaccessible to the plaintiff, in which event he [has] to plead the grounds for his suspicion").

Eighth Circuit – Fusco v. Xerox Corp., 676 F.2d 332, 337 & n.7 (8th Cir. 1982)("[a]ll that is required [under Rule 9(b)] is a short, plain statement of facts sufficient to give the defendant fair notice of the basis of the claim . . . where the proof is largely in the control of the defendant").

Ninth Circuit – Kayport v. Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989)("in cases of corporate fraud, plaintiffs will not have personal knowledge of all of the underlying facts. . . . In such cases, the particularity requirement may be satisfied if the allegations are accompanied by a statement of the facts on which the belief is founded."); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987)(same).

Tenth Circuit – Scheidt v. Klein, 956 F.2d 963, 967 (10th Cir. 1991) ("[a]llegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's belief.").

Eleventh Circuit – Durham v. Business Management Associates, 847 F.2d 1505, 1511-12 (11th Cir. 1988) (in a case involving alleged corporate fraud, "[t]he application of the rule, however, must not abrogate the concept of notice pleading. . . . Allegations of date, time or place satisfy the Rule 9(b) requirement that fraud be pleaded with particularity, but alternative means are also available to satisfy the rule."); *First American Bank & Trust by Levitt v. Frogel*, 726 F.Supp. 1292, 1295 (S.D. Fla. 1989)(". . . in case of corporate fraud, the plaintiff cannot expect to have personal knowledge of all of the facts constituting the wrongdoing. Particularity is satisfied by a statement of the facts upon which the belief of fraud is founded. . .").

District of Columbia Circuit – Kowal v. MCI Communications Corp., Civil Action No. 90-2862 (JGP), 1992 U.S. Dist. LEXIS 7437 (D.D.C. May 20, 1992)(allegations of fraud based on information and belief permissible "as to matters peculiarly within the knowledge of the other party . . ." if "the allegations [are] accompanied by a statement of the facts upon which the belief is founded.").

Thus, it is readily apparent that the decision of the Third Circuit is in complete accord with decisions within all of the other Circuits concerning the proper standard

to be applied in assessing the sufficiency of a complaint under Rule 9(b), and the fact that some courts have upheld complaints and some have dismissed them is readily explained by differences in the factual allegations of the various complaints. There is no conflict among the Circuits. [2]

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2. The three cases cited by Petitioners do not support their conflict argument. Rather those cases turned on their own unique facts.

For example, in *Denny,* the Second Circuit affirmed, for lack of specificity, the dismissal of a federal securities complaint brought by the purchasers of 15 shares of stock against a financial institution and its directors. The Court emphasized that "[t]he amended complaint does not state what items in the 1973 Annual Report were knowingly false," 576 F.2d at 469, did not identify any misleading statement in a document filed with the SEC" (576 F.2d at 470 & n.4), and there was "not even an indication of the date at which defendants knew the investments had become so 'risky' that disclosure was required." *Id.* at 470. It is therefore by no means surprising that the Second Circuit, after carefully considering the factual circumstances before it, affirmed the dismissal of the complaint. It did not set up any different legal standard than applied by the courts below. (The District Court below required specificity of "particular statements which are allegedly false, as well as when, where, and by whom those claims were made." (A-49).)

Similarly, in *Romani,* the First Circuit affirmed the dismissal of a complaint under Rule 9(b), the principal allegation of which was the failure to disclose that the resignation of a principal of the corporation was a "major loss" to the corporation. Noting that "[t]he complaint contains no factual allegations that would support a reasonable inference that adverse circumstances existed at the time of the offering . . . ," and alleged only that one of the corporate defendants "was in poor financial condition" (*Id.* at 879), the court held that dismissal of the complaint was appropriate. There is therefore little doubt that the complaint in *Romani,* like the complaint in *Denny,* would not have passed muster under the decision of the Court of Appeals below.

Likewise, in *DiLeo,* the Seventh Circuit [relying upon the same Third Circuit decision in *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96 (3d Cir. 1983), as the Court of Appeals here specifically did] affirmed the dismissal of a securities complaint against an auditing firm charged with violations of the federal securities laws in connection with inaccuracies in a financial

B. *The Ruling Of The Court of Appeals Below Is Entirely Consistent With Prior Decisions Of The Court of Appeals For The Third Circuit*

In a further effort to create the illusion that the decision of the Court of Appeals below should be reviewed by this Court, Petitioners make the remarkable argument that the Court of Appeals' decision is somehow "inconsistent" with two other Third Circuit's opinions, which affirm the dismissal of securities complaints, *Decker v. Landmark Savings Ass'n,* No. 91-3776 (3d Cir. May 20, 1992), and *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96 (3d Cir. 1983). Petitioners are wrong.

As a threshold matter, a claimed conflict among decisions of different panels of a Court of Appeals is not a consideration justifying the grant of a writ of *certiorari. See Davis v. United States,* 417 U.S. 333, 340 (1974) ("decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences are deemed an intramural matter to be resolved by the Court of Appeals itself.").; Supreme Court Rule 10.

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institution's audited financial statements. *DiLeo* was the last of several securities lawsuits arising from large loan writeoffs by Continental Illinois Bank. The other cases included a securities fraud suit which produced a substantial settlement, and an action brought by the FDIC that culminated in a full trial examining the merits of Ernst & Whinney's role in the events leading up to the large loan writeoffs. *DiLeo,* 901 F.2d at 625. The Seventh Circuit thus held the *DiLeo* complaint to an especially high standard for pleading fraud with particularity because the many investigations and litigations caused a "flood of information" to be released about Continental Bank and that information "offer[ed] ample fodder if there [was] indeed a tale to tell." *DiLeo,* 901 F.2d at 627. Thus, it is apparent that the decision of the Court of Appeals in *DiLeo* turns principally on the fact that there were no facts relevant to the plaintiff's claim that were in the exclusive possession of the defendants, and yet, the plaintiffs had alleged nothing more than a "boiler plate" complaint, which would clearly have been dismissed under the formulation of the Court of Appeals below.

In any event, there is no conflict. In *Landmark*, a panel of the Third Circuit entered an unpublished, one paragraph Judgment Order affirming a five paragraph District Court Order, which in turn affirmed a Magistrate Judge's Report and Recommendation urging the dismissal of a complaint charging a financial institution and its directors with violations of the federal securities laws, for "essentially" the same reasons as the Magistrate Judge. The Third Circuit's unpublished Judgement Order in *Landmark* has no precedential value under the Internal Operating Procedures of the Third Circuit.[3] It is therefore nothing short of astonishing and disingenuous that Petitioners in their attempt to concoct an intra-Circuit conflict repeatedly refer in their Petition to the Third Circuit's non-existent "opinion" in *Landmark* and attempt to pass off the Report and Recommendation of the Magistrate Judge as that of the Third Circuit. The fact of the matter is that there was no Third Circuit "opinion" in *Landmark*. Nor did the Third Circuit "acknowledge" or "reaffirm" (Pet. at 20) anything in *Landmark* other than that the case warranted disposition, by way of a one paragraph judgment order, for "essentially"

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3. Internal Operating Procedure ("IOP") 5.5.2 of the Third Circuit provides as follows:

> *Per curiam opinions, memorandum opinions, and judgment orders.* Per curiam opinions are not published as provided in IOP 5.6.1 unless the panel or court in banc, as the case may be, expressly directs publication. *Judgment orders and memorandum opinions are never published.* (emphasis added).

Third Circuit IOP 5.6 expressly provides that *"[b]ecause only published opinions have precedential value, the court does not cite to its unpublished opinions as authority."* (emphasis added). IOP 6.2.1 provides:

> *A judgment order is filed when the panel unanimously determines* to affirm the judgment or order of the district court or decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines *that a written opinion will have no precedential or institutional value.* (emphasis added).

the same reasons as those expressed by Magistrate Judge. The *Landmark* judgment order cannot serve as the basis of any claimed "intra-Circuit conflict" with the forty five (45) page decision of the Court of Appeals below, as the full Third Circuit, sitting *en banc*, recognized in denying Petitioners' petition for rehearing *en banc* based on the precise "intra Circuit" conflict argument based on the *Landmark* judgment order as Petitioners now raise herein. (A-51 - A-52)

Similarly without merit is Petitioners' argument that the decision of the Court of Appeals below somehow conflicts with the decision of the Third Circuit in *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96, 99 (3d Cir. 1983), where the court affirmed the dismissal of a federal securities complaint against a financial institution and its directors charging the overstatement of reported income and the understatement of loan loss reserves, because the plaintiff had not alleged "the manner in which, in establishing reserves for bad debts in the financial statements relied upon, defendants knowingly departed from reasonable accounting practices," and "what those practices are and how they were departed from." 717 F.2d at 100. In fact, the Court of Appeals below scrupulously adhered to the teachings of the *Christidis* panel in articulating the pleading standards required by Rule 9(b), and emphasized that the *Christidis* standards were "stringent." (A-23). Indeed, the Court cited and quoted extensively from the *Christidis* decision in connection with its discussion of Rule 9(b) standards:

> Rule 9(b) requires a plaintiff to plead (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage. *Christidis v. First Pennsylvania Mortgage Trust,* 717 F.2d 96, 99 (3d Cir. 1983).

> Despite these stringent requirements, the courts should be "sensitive" to the fact that application of the Rule prior to discovery "may permit sophisticated defrauders to successfully conceal the details of their fraud." *Id.* at 99-100. They should also respect the "general simplicity and flexibility" of the Federal Rules of Civil Procedure. *Id.* at 100.

(A-23).

The Court of Appeals' decision below is thus entirely consistent with *Christidis* and is also consistent with the Third Circuit's more recent decision in *In re Craftmatic Securities Litigation*, 890 F.2d 628, 645 (3d Cir. 1989) where the Court – like the panel below – specifically referred to *Christidis*, holding that "[c]ourts must be sensitive to the fact that application of Rule 9(b) prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud' " and should therefore apply Rule 9(b) "flexibly" (890 F.2d at 645) and further held:

> Under a flexible application of Rule 9(b), plaintiffs need not necessarily allege the specific information at defendants' disposal at the time the alleged misrepresentations were made. However, plaintiffs must accompany their allegations with facts indicating why the charges against defendants are not baseless and why additional information lies exclusively within defendants' control.

890 F.2d at 646.

So too in this case, as in *Christidis* and *Craftmatic*, did the Court of Appeals direct that although courts should take a plaintiff's access to non-public details of the alleged fraud into account in assessing the sufficiency of his allegations of fraud, the complaint must nonetheless allege the circumstances of the fraud specifically. In fact, the Court of Appeals in this case went even further and added an additional safeguard against pleading abuse by requiring the plaintiff to allege the

details of his investigation of the alleged fraud, according to the Court of Appeals, "to ensure that plaintiffs thoroughly investigate all possible sources of information, including but not limited to all publicly available information, before filing a complaint." (A-24).

Thus, it is apparent that the decision of the Court of Appeals below does not in any way conflict with prior decisions of the Third Circuit concerning standards to be applied under Rule 9(b).

IV. THE COURT OF APPEALS BELOW HELD THAT STATEMENTS OF MATERIAL FACTS BY CORPORATE OFFICERS AND DIRECTORS MUST BE TRUTHFUL, A RULING ENTIRELY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND WITH THE POLICIES UNDERLYING THE SECURITIES LAWS

In the final two paragraphs of their Reasons For Granting The Writ, Petitioners contend that an additional reason why certiorari should be granted is that the Court of Appeals held that the fact that a corporate director makes any public statement, in and of itself, makes that statement "material" within the meaning of the federal securities laws, thereby "ignoring" this Court's decisions defining the standard of materiality.

Defendants' argument is a gross distortion of the ruling of the Court of Appeals, which did *not* hold that the mere fact that a corporate officer or director makes a statement automatically makes that statement "material." Instead, the Court of Appeals undertook a lengthy and rigorous analysis before arriving at the conclusion that certain of the statements alleged by plaintiffs could be material, and relied upon "an extensive review of the Supreme Court's jurisprudence on materiality." (A-15). The Court of Appeals expressly reaffirmed, applying the precedents of this Court, that a fact is material within the meaning of the federal securities laws only if, after a "delicate assessment[] of the inferences a reasonable

shareholder would draw from a given set of facts," "there is a 'substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder' " and "there is a substantial likelihood that the disclosure would have been viewed by the reasonable investor as having significantly altered the "total mix of information available to that investor." (A-16) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 424 U.S. 438, 449 (1976)). The Court of Appeals thus undertook the precise rigorous, fact intensive materiality analysis that has been mandated by this Court.

Having found, under the analysis mandated by this Court in *TSC v. Northway, Inc.*, that certain of the allegations of the Complaint alleged misstatements of material facts,[4] the Court of Appeals went on to observe that its decision was "supported by" this Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, ____ U.S. ____, 111 S.Ct. 2749 (1991). (A-18). As the Court of Appeals recognized in a three-page analysis of that decision, this Court in *Virginia Bankshares* reaffirmed the materiality standard of *TSC Industries, Inc.*, and held that under that standard statements of a corporation's officers and directors in a proxy statement recommending shareholder approval of a merger by describing the terms of the merger as "fair" and high" were material in that there was a substantial likelihood that a reasonable shareholder would consider such statements important in deciding how to vote on the merger. *Virginia Bankshares*, 111 S.Ct. at 2757. This Court in *Virginia Bankshares* further stated that:

> We have no occasion to decide whether the directors were obligated to state the reasons for their support of the merger proposal here, *but there can*

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4. Following this same fact-intensive analysis mandated by this Court's rulings, the Court found that several of the complaint's allegations *did not* set forth proper claims under the securities laws. See A-17.

> *be no question that the statement they did make carried with it no option to deceive.*

Virginia Bankshares, 111 S.Ct. at 2761 & n.7 (emphasis added).

Having found that the statements of defendants below could be found to be material, the Court of Appeals then simply followed the rulings of this Court in *Virginia Bankshares* and *TSC Industries, Inc.* that when a defendant makes a statement of fact that is material, it is "bound to speak truthfully." (A-18).

Petitioners cannot seriously argue that the Third Circuit is wrong in concluding that statements of material fact by corporate officers and directors must be truthful. It is a fundamental principle of the securities laws that material representations must not be false or misleading. *See Basic, Inc v. Levinson*, 485 U.S. 224, 238 (1988). Petitioners' argument that the Court of Appeals below "ignored" this Court's decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) simply makes no sense. First of all the Court of Appeals specifically cited *Basic*. (A-21). Moreover, *Basic* concerned when a company is obligated to disclose the existence of merger discussions. See 485 U.S. at 236-241. *TSC Industries, Inc.* and *Virginia Bankshares*, which were relied upon by the Court of Appeals below, defined the standards to be applied in determining the "materiality" of statements by corporate insiders. The Court of Appeals opinion dealing with materiality is entirely consistent with *TSC Industries, Inc.*, *Virginia Bankshares* and *Basic* as well.[5] There is, then, no conflict between the

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5. While Petitioners contend wrongfully that the Court of Appeals "ignored" *Basic*, even they do not try to argue that the decision conflicts with *Basic* nor can they credibly so argue. Indeed, in *Basic*, this Court "expressly adopt[ed] the *TSC Industries* standard of materiality for the §10(b) and Rule 10b-5 context," 108 S.Ct. at 983, and reaffirmed that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Id.* at 988. Of course, the Court of Appeals below expressly applied the standard of materiality articulated by

opinion below and this Court's prior holdings.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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NOTES *(Continued)*

this Court in *TSC Northway* in assessing the materiality of the facts alleged by Respondents here to be false and misleading (A-16). The Court of Appeals decision on materiality also scrupulously followed this Court's admonition in *Basic* that, even if a corporation is under no duty to volunteer material information, it is not free to lie once if it chooses to comment concerning that material information. 108 S.Ct. at 987-98. This is precisely what the Court of Appeals ruled here, i.e. "if a defendant has not commented on the nature and quality of the management practices that it has used to reach a particular statement of loan loss reserves, earning, assets or net worth, it is not a violation of the securities laws to fail to characterize these practices as inadequate, meaningless, out of control or ineffective. . . . However, where a defendant affirmatively characterizes management practices as "adequate, 'conservative,' 'cautious' and the like, the subject is 'in play' " and the defendant "thus is bound to speak truthfully." (A-17-18).